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(1)

Supreme Court, U.S.
FILED

AUG 26 2010

OFFICE OF THE CLERK

No. 10-299

In The

Supreme Court of the United States

YUMIN ZHAO,
Petitioner

v.

LONE STAR ENGINE INSTALLTION CENTER, INC.
Respondent

On Petition For Writ Of Certiorari
To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

YUMIN ZHAO
405 N. BOWSER RD. STE. 7A
RICHARDSON, TX 75081
Tel.: 972-234-8568
PRO SE PETITIONER

THE QUESTIONS PRESENTED FOR REVIEW

1. The DTPA (the Tex. Bus. & Com. Code. §17) rule §17.62 (C) provides: "Any final order entered is subject to appeal to the Texas Supreme Court. Petitioner so did, but The Court denied it. Has the decision invalidated an Act of the State of Texas?

2. The decision on this case conflicts with the decisions on other similar cases. Has the decision caused injustice?

3. The petitioner has filed about ten motions in the procedure of this case, none of them was granted. Did the decision on this case violate the 42 U. S. C. 1983?

4. The DTPA and the TRAP are conflict each other in the perfecting procedure, such important issue to the state's jurisprudence involves the construction or validity of a statute, should it be corrected by the Supreme Court of The United States?

PETITION FOR WRIT OF CERTIORARI

Yumin Zhao, on behalf of himself, hereby petitions for a writ of certiorari to review the final decision of the Supreme Court of Texas rendered on May 28, 2010.

JURISDICTIONAL STATEMENT

The Supreme Court of Texas' final decision was entered on May 28, 2010, this Court's jurisdiction is invoked pursuant to the statutory provision 28 U.S.C. § 1257 (a).

Besides, the validity of the Texas Business & Commerce Code, Chapter 17. Deceptive Trade Practices Act is drawn in question.

Furthermore, the Constitutional provision 42 U. S. C. 1983 is involved as well.

STATEMENT OF THE CASE

Nature of the case: This appeal arises from a judgment on a non-jury trial in the violations of Texas Deceptive Trade Practices Act case, et seq. the "DTPA". (CR 8-12).

Proceedings in the trial court: The lawsuit was filed in the 134th District Court, Dallas County, Texas. The Honorable James Stanton Judge presiding.

The judgment of the trial court: Judge James Stanton signed a "Take Nothing" judgment in favor of the defendant, Lone Star Engine, ET. AL. on May 20, 2009. (Pet. App. 17).

Motion for new trial: Plaintiff, Yumin Zhao timely filed motion for new trial on June 19, 2009 (CR 23), which was set for hearing on Sept. 2nd, 2009. The Judge denied the motion and said "the court has no

power to grand the motion after 75 days." And did not sign any order. Even thought Plaintiff held Txe. R. Civ. P. 329b (e).

Motion for reconsideration: Plaintiff filed motion for reconsideration on Sept. 2nd, 2009 (CR 66). The court set the hearing on Sept. 18, 2009, yet the court has lost the plenary power since Sept. 3rd, 2009.

Proceedings in the court of appeals: The Appellant appealed the judgment to the Court of Appeals, Fifth District of Texas at Dallas on Sept. 2nd, 2009 which was within 15 days period provided by Rule 26 (3) a. The plaintiff, Yumin Zhao was appellant, the defendant, Lone Star Engine, ET. AL. was appellee. Motion for extend was filed on Sept. 22nd, 2009 under the court's direction per Rule 10.5(b).

The opinion of the panel: The panel that decided the case was composed of Justices Wright, Richter and Fillmore. The Court of Appeals rendered its judgment and issued a per curiam opinion on Oct. 6, 2009 (Pet. App. 12, 13). The appellant filed the motion for rehearing on Oct. 20, 2009. The Court denied it on Nov. 5, 2009 (Pet. App. 11). Motion for en banc reconsideration was filed on Nov. 16, 2009. The Court denied the motion on Dec. 3, 2009 (Pet. App. 10).

The judgment of the court of appeals: The court of appeals DISMISSES the appeal, and ordered that appelllee Lone Star Engine recover its costs of the appeal from appellant (Pet App. 16).

Proceedings in the Supreme Court of Texas: The Appellant filed Petition for Review to the Supreme Court of Texas on Jan. 16, 2010 as provided by "DTPA" § 17.62. (c) (Pet. App 18), The Court denied the petition on Apr. 9, 2010 (Pet. App.7). The Motion for Rehearing was filed on Apr. 21, 2010, The Court denied the motion on May 28, 2010 (Pet. App. 6).

The Appellant filed Motion to Stay the Mandate Pending the Filing of a Petition for a Writ of Certiorari on June 11, 2010 to the court of appeals, the court denied the motion on June 29, 2010. (Pet. App. 8).

The Appellant filed the Motion for rehearing on July 14, 2010, The Court holding the motion until now.

The Appellant filed the Motion to Recall Mandate on July 22nd, 2010, The Court denied the Motion on July 29, 2010. (Pet. App. 9).

REASONS FOR GRANTING THE WRIT

The Writ must be granted because the reasons stated below:

I. The DTPA (the Tex. Bus. & Com. Code. §17) rule §17.62 (C) states: "When a petition is filed in the district court in any county under this section, the court shall have jurisdiction to hear and determine the matter presented and to enter any order required to carry into effect the provisions of Sections 17.60 and 17.61 of this subchapter. Any final order entered is subject to appeal to the Texas Supreme Court. Failure to comply with any final order entered under this section is punishable by contempt." Petitioner so did pursuant to this statute, but The Supreme Court of Texas denied the petition and rehearing. Therefore, the statute of DTPA has been invalidated in this case. People will don't know what to do on the same situation in the future. Or the DTPA should be removed from Texas Commerce Code.

II. The decision on this case conflicts with the decision in cases of *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (TEX 1997); *Dimotsis v. State* Farm Lloyds, 966 S.W.2d 657, 657 (Tex. 1998); *Jones v. City of Houston*, 976 S. W. 2d 676, 677 (Tex. 1998); *Lockhart v. McCurley*, Houser, 243 S.W.3d at 647; In re B.G., 104 S.W.3d 565, 567 (Tex. App.—Waco 2002, order); *Scott-Richter v. Taffarello*, 186 S.W.3d 182,

186 (Tex App.- Fort Worth 2006). The decision has caused injustice.

III. The decision on this case violated the 42 U. S. C. 1983. Because the petitioner has filed about ten motions in the procedure of this case, none of them was granted. As a minority (ethnic group) and pro se petitioner, I have experienced the double standards and discrimination in the legal procedure, and did not see any Equal Justice for All under Law. Petitioner's constitutional and statutory rights of proper proceeding for redress were deprived obviously.

IV. The DTPA and the TRAP are conflict each other in the appeal perfecting procedure, such important issue to the state's jurisprudence involves the construction or validity of a statute, it should be corrected by the involvement of The Supreme Court of United States.

About twenty years ago, I learned that The United States is the most strictly legislative country in the world, all people are equal, and have same constitutional and statutory rights. Martin Luther King's sacrifice was finally rewarded by having the equal rights for everyone. Therefore, I gave up my Chinese nationality, and became a US citizen. However, my skin color and my name are still different from Native Americans. Because of this, my case was treated unfairly in trial count and the appeals court. My motions were never being granted. The facts, the truths, the evidence, the justice, they all are not the matters. I was proud to be an American on my own choice. And now I am very shaming for the things happening to this case. And no one can believe this is in the United States of American.

CONCLUSION

For the reason set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

[Signature]

Yumin Zhao
405 N. Bowser Rd. Ste. 7A
Richardson. TX 75081
972-234-8568 (Tel/Fax)

Pro Se Petitioner

APPENDIX

Seal of The State of Texas

OFFICIAL NOTICE FROM SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 73711 -2248

DATE: 05/28/2010

RE: Case No. 10-0046
COA #: 05-09-01055-CV
TC #: 08-10266

STYLE:
YUMIN ZHAO
v,
LONE STAR ENGINE INSTALATION CENTER, INC.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MAIL TO:
MR. YUMIN ZHAO
526A NORTH INTERURBAN STREET
RICHARDSON TX 75081

02 1A 0004392386 MAY 28, 2010
MAILED FROM ZIP CODE 78701

Seal of The State of Texas

OFFICIAL NOTICE FROM SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 73711 -2248

DATE: 04/09/2010

RE: Case No. 10-0046
COA #: 05-09-01055-CV
TC #: 08-10266

STYLE:
YUMIN ZHAO
v,
LONE STAR ENGINE INSTALATION CENTER, INC.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO:
MR. YUMIN ZHAO
526A NORTH INTERURBAN STREET
RICHARDSON TX 75081

02 1A 0004392386 APR 09, 2010
MAILED FROM ZIP CODE 78701

Order issued June 29, 2010

Seal of The State of Texas

In The
Court of Appeals,
Fifth District of Texas at Dallas

No. 05-09-01055-CV

YUMIN ZHAO, Appellant
V.
LONE STAR ENGINE INSTALLATION CENTER, INC., Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 08-10266

ORDER

The Court has before it appellant's motion to stay the mandate pending the filing of a petition for a writ of certiorari. The Court DENIES the motion.

S/ MICHAEL J. O'NEILL
MICHAEL J. O'NEILL
JUSTICE

Order issued July 29, 2010

Seal of The State of Texas

In The
Court of Appeals,
Fifth District of Texas at Dallas

No. 05-09-01055-CV

YUMIN ZHAO, Appellant
V.
LONE STAR ENGINE INSTALLATION CENTER, INC., Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 08-10266

ORDER

The Court has before it appellant's July 23, 2010, motion to recall mandate. The Court DENIES the motion.

S/ MICHAEL J. O'NEILL
MICHAEL J. O'NEILL
JUSTICE

Order issued December 3, 2009

Seal of The State of Texas

In The
Court o Appeals
Fifth District of Texas at Dallas

No. 05-09-01055-CV

YUMIN ZHAO, Appellant
V,
LONE STAR ENGINE INSTALLATION CENTER, INC., Appellee

ORDER

Before Chief Justice Wright, Justice Richter and Justice Fillmore We DENY appellant's motion for rehearing en bane.

S/MARTIN RICHTER
MARTIN RICHTER
JUSTICE

Order filed November 5, 2009

Seal of The State of Texas

In The
Court o Appeals
Fifth District of Texas at Dallas

No. 05-09-01055-CV

YUMIN ZHAO, Appellant
V,
LONE STAR ENGINE INSTALLATION CENTER, INC., Appellee

ORDER

Before Chief Justice Wright, and Justice Richter and Fillmore We DENY appellant's motion for rehearing.

S/MARTIN RICHTER
MARTIN RICHTER
JUSTICE

Seal of The State of Texas

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

No. 05-09-01055-CV

YUMIN ZHAO, Appellant
V.
LONE STAR ENGINE INSTALLATION CENTER, INC., Appellee

Appeal from the 134fh Judicial District Court of Dallas County, Texas. (Tr. Ct No. 08-10266). Opinion delivered per curiam before Justices Wright, Richter, and Fillmore.

Based on the Court's opinion of this date, we DISMISS the appeal. We ORDER that appellee Lone Star Engine Installation Center, Inc. recover its costs of the appeal from appellant Yumin Zhao.

Judgment entered October 6, 2009,

S/MARTIN RICHTER
MARTIN RICHTER
JUSTICE

DISMISS and Opinion Filed October 6, 2009

Seal of The State of Texas

In The
Court of Appeals
Fifth District of Texas at Dallas

YUMIN ZHAO, Appellant
v,
LONE STAR INSTALLATION CENTER, INC.,
Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas

Trial Court Cause No. 08- 10266

MEMORANDUM OPINION

Before Justices Wright, Richter, and Fillmore

The Court has before it appellant's September 22, 2009 motion to extend time to file his notice of appeal and appellee's response in opposition to the motion. For the reason set forth below, we deny the extension motion and dismiss the appeal,

The trial court's judgment was signed on May 20, 2009 and appellant filed a timely motion for new trial. Therefore, his notice of appeal was due by August 18, 2009, See TEX. R. APP, P, 26, 1(a). The notice of appeal was filed on September 2, 2009, within the fifteen-day period provided by rule 26.3. See TEX. R. App. P, 26.3(a). Therefore, we directed appellant to file a motion to extend time to file his notice of appeal setting forth a reasonable

explanation for the need of the extension. *See* TEX. R. APP. P.10.5(b), 26.3(b); *Verburgt v. Darner*, 959 S.W.2d 615 (Tex, 1997).

In his extension motion, appellant asserted, "Plaintiff's motion for new trial was timely filed on June 19, 2009. The hearing date of motion for new trial was set on Sept 2nd, 2009; Therefore whether to appeal only could be determined after the hearing of motion for new trial," Appellee responded that appellant did not provide a reasonable explanation because the motion for new trial had already been overruled by operation of law on August 3. 2009, and appellant did not file his notice of appeal until the 105th day after the trial court's judgment was signed. We agree that appellant has not provided a reasonable explanation for the need of the extension.

The Texas Supreme Court has defined "reasonable explanation" to mean "any plausible statement of circumstance indicating that failure to file within the [required] period was not deliberated or intentional, but was the result of inadvertence, or mischance." *Garcia v, Kastner Farms. Inc.,* 774 S.W.2d 668, 669 (Tex. 1989) (internal citation omitted). "Any conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake, or mischance, ..." *Id.* at670.

Texas courts have rejected as unreasonable explanations that show a defendant's conscious or strategic decision to wait to file a notice of appeal, reasoning the explanations did not show inadvertence, mistake, or mischance. *See, e.g., Hykonnen v, Baker Hughes Bus. Support Servs.,* 93 S.W.3d 562, 563-64 (Tex. App.-Houston [14th Dist.] 2002, no pet.) (holding unreasonable appellant's explanation he failed to file notice of appeal until he found attorney to represent him on appeal at little or

no cost); *Rodman v. State*, 47 S.W.3d 545, 548-49 (Tex, App.-Amarillo 2000, no pet,) (holding unreasonable explanation that when State disclosed, after expiration of time for filing notice of appeal, its intent to indict appellant for other crimes, appellant decided to appeal to preserve eligibility for probation in upcoming trials); *Kidd v. Paxton*, I S. W.3d 309, 310-13 (Tex. App.-Amarillo 1999, no pet.) (op, on reh'g) (holding unreasonable explanations counsel miscalculated due date for filing notice of appeal when he failed to file notice of on miscalculated date and counsel's preoccupation with other cases without detailed explanation of complexities and relevant deadlines of other cases); *Weik v, Second Baptist Church of Houston*, 988 S.W.2d 437, 439 (Tex. App. Houston [1st Dist.] 1999, pet, denied) (holding unreasonable appellant's explanation that his lawyer told him if he appealed case while trial court still had authority to reinstate case, trial court would reinstate case and appellant would have difficult time prosecuting claim because of trial court's displeasure with appellant). This Court has likewise rejected as unreasonable explanations that showed an appellant's decision to wait to file a notice of appeal was not due to inadvertence, mistake,, or mischance, but was due to a conscious decision to ignore the appellate timetable in favor of the trial court's jurisdictional timetable. *See Crossland v. Crossland*, No, 05-06-00228-CV, 2006 WL 925032 (Tex. App.-Dallas Apr. 11, 2006, no pet.) (mem, op.) (per curiam).

Because appellant's explanation in this case shows he was aware of the deadline for filing his notice of appeal, but consciously ignored the deadline in favor of waiting for a ruling on his motion for new trial, we

conclude appellant has not provided a reasonable explanation for the need of the extension. We deny his motion to extend time to file his notice of appeal.

We dismiss the appeal for want of jurisdiction.

PER CURIAM

09I055F.P05

CAUSE NO. 08-10266

ZHAO
VS.
LONE STAR ENGINE, ET. AL

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
134th JUDICIAL DISTRICT

JUDGMENT

After considering all the evidence presented at the non-jury trial of this matter on this day, the Court finds for the Defendants and enters this judgment that the Plaintiff take nothing from this suit.

Taxable costs of Court are to be borne by the party incurring same.

This is a final and appealable judgment.

DATED: May 20, 2009.

S/JAMES M. STANTON
JAMES M. STANTON

TEXAS BUSINESS & COMMERCE CODE

CHAPTER 17. DECEPTIVE TRADE PRACTICES

Tex. Bus. & Com. Code. § 17 60-62

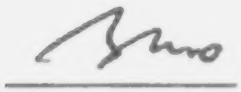
§ 17.62. PENALTIES.

(c) When a petition is filed in the district court in any county under this section, the court shall have jurisdiction to hear and determine the matter presented and to enter any order required to carry into effect the provisions of Sections 17.60 and 17.61 of this subchapter. **Any final order entered is subject to appeal to the Texas Supreme Court. Failure to comply with any final order entered under this section is punishable by contempt.**

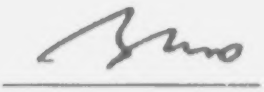
Added by Acts 1973, 63rd Leg., p. 322, ch. 143, § 1, eff. May 21, 1973.

CERTIFICATE OF SERVICE

I, Yumin Zhao, petitioner, do hereby certify that three true and correct copies of the foregoing has been mailed via USPS first class mail to JAMES N. APOSTLE, Attorney for Lone Star Engine, at LAW OFFICE OF JAMES N. APOSTLE, 4600 GREENVILLE AVE • SUITE 120, Dallas, Texas 75206 on this the 26th day of Aug, 2010.



I declare under penalty of perjury that the foregoing is true and correct. And is in compliance with 28 U. S. C. § 1746. Rule 29.5(c).



CERTIFICATE OF COMPLIANCE

No. _____

YUMIN ZHAO,
Petitioner

v.

LONE STAR ENGINE INSTALLATION CENTER, INC.
Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 1161 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.
Executed on Aug. 26, 2010.